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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 BRC PROPERTIES, INC.)
)
 Defendant.)

CIVIL ACTION NO. 3:12-cv-00128

JUDGE KIM R. GIBSON

ELECTRONICALLY FILED

CONSENT DECREE

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA"), seeking reimbursement of response costs incurred or to be incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the Barefoot Disposal Site in Blair County, Pennsylvania ("the Site").

B. On April 5, 1991, EPA issued an Administrative Order for Removal Response Activities, Docket No. III-91-32-DC, to several potentially responsible parties requiring them to perform response activities at the Site. On October 20, 1993, EPA issued another Administrative Order for Removal Response Activities, Docket No. III-93-46-DC, to Defendant BRC

Properties, Inc., or its predecessor, *inter alia*, requiring it to perform response activities at the Site. On June 14, 1994, EPA issued an amendment to the Administrative Order issued in 1991. These are collectively referred to herein as "Administrative Orders" or "AOs."

C. Nothing in this Consent Decree is intended to abrogate or excuse Settling Defendant's obligations under the AOs, and the AOs remain in full force and effect.

D. The Defendant entering into this Consent Decree ("Settling Defendant") does not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint.

E. The United States and Settling Defendant agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaint Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States, and upon Settling Defendant and its successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendant under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided in this Consent Decree, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

a. "Administrative Orders" or "AOs" shall mean the Administrative Order for Removal Response Activities, EPA Docket No. III-91-32-DC, issued April 5, 1991; the Administrative Order for Removal Response Activities, EPA Docket No. III-93-46-DC, issued October 20, 1993; and the First Amendment to the Administrative Order for Removal Response Activities Dated April 5, 1991, issued June 14, 1994.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

c. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.

d. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

e. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

f. "Effective Date" shall be the date upon which this Consent Decree is entered by the Court as recorded on the Court docket, or, if the Court instead issues an order approving the Consent Decree, the date such order is recorded on the Court docket.

g. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

h. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

i. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs that the United States incurs in connection with the Site after May 20, 2010 for response actions relating to Site Assessment until the date of a Remedial Site Assessment Decision for the Site. Future Response Costs shall also mean (i) all Future Oversight Costs the United States incurs in connection with the AOs and (ii) all costs, including but not limited to, direct and indirect costs that the United States incurred in connection with the Site before May 20, 2010, but did not pay until after May 20, 2010, for Site Assessment, and oversight of the AOs.

j. "Future Oversight Costs" shall mean that portion of Future Response Costs that

EPA incurs in monitoring and overseeing implementation of the AOs, including costs incurred in reviewing plans, reports, and other deliverables submitted by Settling Defendant pursuant to the AOs. Future Oversight Costs do not include, *inter alia*, any costs incurred by the United States in enforcing the AOs.

k. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

l. "Lyondell Settlement" shall mean the settlement agreement approved by the United States Bankruptcy Court for the Southern District of New York on April 23, 2010, in the matter of *In re: Lyondell Chemical Company, et al.*, Case No. 09-10023.

m. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

n. "Parties" shall mean the United States and Settling Defendant.

o. "Past Response Costs" shall mean all costs, including but not limited to, direct and indirect costs, that the United States has paid at or in connection with the Site through May 20, 2010, plus accrued Interest on all such costs through such date.

p. "Plaintiff" shall mean the United States.

q. "Response Costs" shall mean both Past Response Costs and Future Response Costs.

r. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

s. "Settling Defendant" shall mean BRC Properties, Inc.

t. "Site" shall mean the Barefoot Disposal Site located on Catfish Ridge in Blair County, Pennsylvania.

u. "Site Assessment" shall mean activities taken by EPA in relation to the Site pursuant to 40 C.F.R § 300.420 of the National Contingency Plan, including but not limited to, the collection of data for use in Site evaluation and hazard ranking activities to form a recommendation by EPA on whether further action is warranted, as set forth in the Remedial Site Assessment Decision for the Site.

v. "Special Account" shall mean the Barefoot Disposal Site Special Account, within the EPA Hazardous Substances Superfund, established for the Site pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3), and established as a result of the Lyondell Settlement.

w. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

V. PAYMENT OF RESPONSE COSTS

4. Payment of Response Costs to EPA. Within 30 days after the Effective Date, Settling Defendant shall pay to EPA the sum of \$60,000.00 in payment of Response Costs.

5. Payment by Settling Defendant shall be made at <https://www.pay.gov> to the U.S. Department of Justice account, in accordance with instructions provided to Settling Defendant

by the Financial Litigation Unit ("FLU") of the United States Attorney's Office for the Western District of Pennsylvania after the Effective Date. The payment instructions provided by the FLU shall include a Consolidated Debt Collection System ("CDCS") number, which shall be used to identify all payments required to be made in accordance with this Consent Decree. The FLU shall provide the payment instructions to:

Christopher Schraff
Porter Wright Morris & Arthur, LLP
41 South High Street, Suites 2800-3200
Columbus, Ohio 43215-6194

on behalf of Settling Defendant. Settling Defendant may change the individual to receive payment instructions on their behalf by providing written notice of such change in accordance with Section XII (Notices and Submissions).

6. At the time of payment, Settling Defendant shall send notice that payment has been made to EPA and DOJ in accordance with Section XII (Notices and Submissions), and to the EPA Cincinnati Finance Office by email at acctsreceivable.cinwd@epa.gov, or by mail to:

EPA Cincinnati Finance Office
26 Martin Luther King Drive
Cincinnati, Ohio 45268

Such notice shall reference the CDCS Number, Site/Spill ID Number 036P, and DOJ case number 90-11-3-09307.

7. The total amount to be paid by Settling Defendant pursuant to Paragraph 4 shall be deposited in the Barefoot Disposal Site Special Account within the EPA Hazardous Substance Superfund. EPA, in its sole discretion, may retain and use these funds, and any other funds placed in the Barefoot Disposal Site Special Account, to conduct or finance response actions at

or in connection with the Site, or to transfer such funds to the EPA Hazardous Substance Superfund.

VI. FAILURE TO COMPLY WITH CONSENT DECREE

8. Interest on Late Payments. If the Settling Defendant fails to make any payment under Paragraph 4 (Payment of Response Costs) by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

9. Stipulated Penalty.

a. If any amounts due under Paragraph 4 are not paid by the required date, Settling Defendant shall be in violation of this Consent Decree and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 8, \$1,000 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made by Fedwire Electronic Funds Transfer to:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

and shall reference the CDCS Number, Site/Spill ID Number 036P, and DOJ Case Number 90-11-3-09307.

c. At the time of payment, Settling Defendant shall send notice that payment has

been made to EPA and DOJ in accordance with Section XII (Notices and Submissions), and to the EPA Cincinnati Finance Office by email at acctsreceivable.cinwd@epa.gov, or by mail to:

EPA Cincinnati Finance Office
26 Martin Luther King Drive
Cincinnati, Ohio 45268

Such notice shall reference the CDCS Number, Site/Spill ID Number 036P, and DOJ Case Number 90-11-3-09307.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Defendant of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing in this Consent Decree shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

10. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to comply with the requirements of this Consent Decree.

11. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling Defendant from payment as required by Section V or from performance of any other requirements of this Consent Decree.

VII. COVENANTS BY PLAINTIFF

12. Covenants for Settling Defendant by United States. Except as specifically provided in

Section VIII (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Response Costs. This covenant not to sue shall take effect upon receipt by EPA of the payment required by Section V, Paragraph 4 (Payment of Response Costs), and any Interest or stipulated penalties due thereon under Section VI (Failure to Comply with Consent Decree). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree.

VIII. RESERVATIONS OF RIGHTS BY UNITED STATES

13. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within the Covenants by Plaintiff in Section VII. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendant with respect to:

- a. liability for failure of Settling Defendant to meet a requirement of this Consent Decree;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments; and

f. liability for all costs, including, but not limited to, direct and indirect response costs, that the United States may incur in connection with the Site due to Settling Defendant's failure to comply with the AOs, plus Interest on all such costs which may accrue pursuant to 42 U.S.C. § 9607(a). Such costs shall be excluded from the definition of Future Response Costs contained in this Consent Decree.

IX. COVENANTS BY SETTLING DEFENDANT

14. Covenant Not to Sue by Settling Defendant. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, or their contractors or employees, with respect to Response Costs and this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of the response actions at the Site for which the Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the Commonwealth of Pennsylvania, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States, including any department, agency, or instrumentality of the United States, pursuant to Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law for Response Costs.

15. Nothing in this Consent Decree shall be deemed to constitute approval or

preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

16. Settling Defendant agrees not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that it may have for all costs expended or to be expended in implementing the AOs and for Response Costs as defined by the Consent Decree against any person that has entered or in the future enters a final settlement based on limited ability to pay with EPA with respect to the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that the Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against the Settling Defendant nor shall it apply to any response costs relating to the Site that the Settling Defendant may incur as a result of any administrative order, cost recovery action, or action for injunctive relief issued or brought after the Effective Date by the United States or any other person, including the Commonwealth of Pennsylvania.

X. EFFECT OF SETTLEMENT/CONTRIBUTION

17. Except as provided in Paragraph 16 (Ability to Pay Waiver), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Except as provided in Paragraph 16 (Ability to Pay Waiver), each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Consent Decree diminishes the

right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. 9613 § (f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

18. The Parties agree, and by entering this Consent Decree this Court finds, that this Consent Decree constitutes a judicial settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that the Settling Defendant is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), or as may be otherwise provided by law, for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are Response Costs as defined herein.

19. Settling Defendant shall, with respect to any suit or claim brought by it for matters related to this Consent Decree, notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendant also shall, with respect to any suit or claim brought against it for matters related to this Consent Decree, notify EPA and DOJ in writing within 10 days of service of the complaint or claim upon it. In addition, Settling Defendant shall notify EPA and DOJ within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

20. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles

of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants by Plaintiff set forth in Section VII.

21. The Parties agree that this Consent Decree satisfies any and all obligations of the United States to the Settling Defendant with respect to the distributions for Allowed General Unsecured Claims received by the United States pursuant to the Lyondell Settlement for the Barefoot Disposal Site, specifically any rights to a credit pursuant to Paragraph 10 of Exhibit 1 to the Lyondell Settlement, attached as Appendix A, to this Consent Decree.

XI. RETENTION OF RECORDS

22. Until 10 years after the entry of this Consent Decree, Settling Defendant shall preserve and retain all non-identical copies of Records now in its possession or control, or that come into its possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

23. After the conclusion of the 10-year document retention period in the preceding Paragraph, Settling Defendant shall notify EPA and DOJ at least 90 days prior to the destruction of any such Records, and, upon request by EPA or DOJ, Settling Defendant shall deliver any such Records to EPA. Settling Defendant may assert that certain Records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege, it shall provide Plaintiff with the following: 1) the title of the Record; 2)

the date of the Record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the Record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the Record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a Record, the Record shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendant shall retain all Records that it claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendant's favor. However, no Records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged or confidential.

24. Settling Defendant certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any Records (other than identical copies) relating to its potential liability regarding the Site since the demand for payment of costs issued by EPA on April 19, 2000, and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. NOTICES AND SUBMISSIONS

25. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified in this Section shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United

States, EPA, DOJ, and Settling Defendant, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice (DJ # 90-11-3-09307)
P.O. Box 7611
Washington, D.C. 20044-7611

As to EPA:

Mary Rugala
Senior Assistant Regional Counsel
U.S. EPA, Region III (3RC42)
1650 Arch Street
Philadelphia, PA 19103

As to Settling Defendant:

Christopher Schraff
Port Wright Morris & Arthur, LLP
41 South High Street, Suites 2800-3200
Columbus, Ohio 43215-6194

XIII. RETENTION OF JURISDICTION

26. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XIV. INTEGRATION/APPENDICES

27. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent

Decree. The following appendix is attached to and incorporated into this Consent Decree:

“Appendix A” is Exhibit 1 to the Lyondell Settlement.

XV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

28. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

29. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of either Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XVI. SIGNATORIES/SERVICE

30. The undersigned representative of the Settling Defendant to this Consent Decree and the Acting Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division, United States Department of Justice, certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

31. Settling Defendant agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

32. Settling Defendant shall identify, on the attached signature page, the name and

address of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

XVII. FINAL JUDGMENT

33. Upon entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between and among the United States and the Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS 23rd DAY OF August, 2012.

A handwritten signature in black ink, appearing to read "Kim R. Gibson", written over a horizontal line.

Honorable Kim Gibson
United States District Judge